

Sedition Laws and the Requirement of Incitement to Imminent Disorderly Conduct: A Critical Analysis of *Chihana v. Republic*.

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I hereby declare that I have read and understood the regulations governing the submission of Post Graduate Diploma dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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INTRODUCTION

Imagine we are back in 1994 and Bakili Muluzi is President of the Republic of Malawi. In recent years criticism of the government has become common. The president makes a televised address to the nation to announce his proposal to repeal sections 50 and 60 of the Penal Code of Malawi (“the Code”), relevant provisions of the Protected Flags, Names and Emblems Act, and the Preservation of Public Security Act. He declares Malawi an open and democratic society and his intention to promote a culture of tolerance in Malawi. He further states that since governments and its institutions are far more likely to succeed if they subject leaders to critical scrutiny, he believes his proposal is the right thing for all Malawians who love freedom and democracy. What would have been the reaction to such a proposal? One can certainly imagine massive support from civil rights organizations and their allies. Editorial boards at leading newspapers would have written editorials praising this democratic move in Malawi. And leading academics would have supported this as a symbol of an open and democratic society.

Of course, Muluzi never proposed such an audacious plan; yet this is precisely what is lacking in Malawi. This article reviews the application of laws against sedition in Southern Africa, with emphasis on Malawi’s application of these laws in the 1992 trial of Chakufwa Chihana. This analysis is placed within the context of a review of the development of sedition laws in Britain and the United States and a critical review of the Malawi Supreme Court of Appeal decision in *Chihana v. Republic*.¹ The article revisits the Court’s opinion in *Chihana* to recommend that Parliament amend the relevant provisions of the sedition laws by providing a set of guidelines for courts to consider when determining what constitutes permissible restrictions of speech. It concludes that the establishment of a democratic order means, if anything, speech critical of government officials

¹ MSCA Crim. App. No. 9 of (1992)(unreported)

and its policies should remain uninhibited, unless restriction is essential to prevent an incitement to imminent disorderly conduct.

Section I discusses the early European developments of sedition law and how courts interpreted and applied them. Section II looks at the development of sedition laws in American jurisprudence and highlights the United States Supreme Court's struggle with the early cases. Section III reviews critically the Malawi Supreme Court of Appeal's opinion in *Chihana* in light of similar court opinions in the Commonwealth, Europe and the United States. This review will focus on two central issues in *Chihana*: the first is the inclusion of 'incitement to violence' as a necessary element for sedition; the second is the court's scrutiny of what constitutes permissive restrictions of speech in the context of the sedition analysis.

THE GENESIS OF SEDITION LAWS AND EARLY APPLICATION

The English Court of the Star Chamber invented the crime of sedition based on the theory that the King was above public criticism and that, therefore, statements critical of the government were prohibited. This was a novel and inventive means to silence government opponents.² The crime was based on the hypothesis that those who did not share the government's principles must consider its attempt to promulgate those principles as oppressive and to be defied. Therefore, 'anyone who attempted to persuade others that the government's methods were extremely erroneous must intend the expected consequences of his acts, which would be rebellion'.³ The crime suggested that the utterance might in itself cause injury to the sovereign, thus, an assault on the dignity of the authority was judged to undermine his authority and to weaken the affection of his subjects in the same approach that libel or slander offended an individual's reputation.⁴

² See J. Burchell & J. Milton, *Principles of Criminal Law*, Cape Town, Juta & Co Ltd, 1st ed., (1991), pp. 616-617, (noting the historical use of the offence of sedition against government critics)

³ 14 T. Howell, *A Collection of State Trials*, London, T.C. Hansard for Longman, (1704), pp. 1095-1128

⁴ See, E. Barendt, *Freedom of Speech*, Oxford, Clarendon Press, (1985), pp. 153.

Disapprobation of government principles had to be silenced because they intimidated appearances.⁵ Chief Justice Holt eloquently explained the need for the prohibition of seditious libel when he wrote in 1704 that:

“To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is necessary for all governments that people should have a good opinion of it.”⁶

In view of the fact that the objective of the crime of sedition was to avoid the formulation of ill opinions of the government, truth was eliminated as a defence, if anything; true speech was perceived as worse than speculative speech since it had the potential to produce more harm to the reputation and appearance of the government.⁷ The *ratio decidendi* in the first sedition libel case in the Star Chamber in 1606 was that “seditious libel be it against the magistrate, or other public persons, is a greater offence, for it concerns not only the breach of the peace, but also the scandal of government”⁸ In this regard, Lord Coke pronounced that ‘it is not material whether the libel be true, or whether the party against whom it is made, be of good or ill fame.’⁹ The simple character of the words to weaken the authority of the government was a qualified basis for prosecution. This bond between government and society became chiefly responsible for the prevalence of

⁵ J. Koffer and B. Gershan, *The Seditious Libel*, 69 *Cornell LR* (1984), pp. 816.

⁶ *Rex v. Tutchin*, 14, *A Complete Collection of State Trials* (1704), pp. 1096, 1128, quoted by Koffer and Gershan at pp. 822.

⁷ *Id.* See also E. Chemerinsky, *Constitutional Law*, Gaithersburg, MD, Aspen Law & Business (2001), pp. 896.

⁸ 77 E.R. 251 (1606)

⁹ *Id.* This sentiment was also eloquently echoed recently by then Chief Justice Banda in *Chihana*, *supra* note 1 when he noted “the appellant may well have felt honestly and sincerely that what he stated was true but the law says that is not a defense.” *Id.*

prosecutions of sedition in the eighteenth and nineteenth century England.¹⁰

Although disaffection was an issue at trial, it seldom presented a problem for the government or the court, as it could be without difficulty attributed to the defamatory content of the communication. The substance itself gave rise to an inference of contempt, which according to one commentator, was questioned only in proceedings which the judge thought the communication was unqualifiedly defamatory to infer contempt.¹¹ The judge also had discretion to decide whether the substance was seditious. This was accomplished by reviewing the substance of a communication. Political prosecution focused on the “bad tendency” or derogatory inclination of the terminology in evidence. Since the basis for seditious libel incorporated the broad notion of shrinking the devotion of the people for the King and his government, judges actively determined what constituted libel without challenge.¹²

THE EARLY AMERICAN LEGISLATION

The First Amendment to the United States Constitution provides that: “Congress shall make no law abridging the freedom of speech, or the press.”¹³ On its face, the First Amendment unquestionably was motivated by the censorship of speech that existed in English society.¹⁴ Professor Zacharia Chaffee has remarked that the First Amendment was intended to ‘remove the common law of sedition, and make further prosecutions for

¹⁰ Barendt, *supra* note 4 at 153.

¹¹ P. Hamburger, “The Development of the Law of Seditious Libel and the Control of the Press,” 37 *Stanford. LR* (1985), pp. 661, 705.

¹² *Id.* at pp. 702

¹³ U.S. Const. Amend. I.

¹⁴ See, Chemerinsky, *supra* note 7 at pp. 895 (stating that until 1694 there was a system of licensing in England where no publication was permitted without a government issued license)

criticism of the government, without any incitement to wrongdoing, impossible in American society'.¹⁵

Despite this understanding, speech critical of the government or its officials remained seditious and punishable in America after the adoption of the Constitution in 1789.¹⁶ In fact, many of those who framed and approved the American Constitution participated in the adoption of the Alien and Sedition Act of 1798.¹⁷ This law punished the communication of “false, scandalous, and malicious writing or writings against the government of the United States, with intent to defame; or bring them into contempt or disrepute; or to incite against them hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resting any law of the United States, or any act of the President of the United States.”¹⁸

The distinguishing factor of this law from the English experience is that the American law permitted truth as a defence and required proof of malicious intent. Fortunately for the government, the United States Supreme Court was never presented with an occasion to decide the constitutionality of the Alien and Sedition Act until it was repealed following the election in 1800.¹⁹ Prior to being repealed, the Federalist had used the law against its opponents the Republicans.²⁰

¹⁵ For a historical discussion of the First Amendment see, Z. Chaffee, *Free Speech in the United States*, Harvard University Press, 2nd ed., (1941), pp. 21.

¹⁶ Professor Smolla stating that “one can keep going round and round on the original meaning of the First Amendment, but no clear, consistent vision of what the framers meant by freedom of speech will ever emerge.” R. Smolla, *Smolla and Nimmer on Freedom of Speech*, New York, Clark Boardman Callahan, 3rd ed., (1996), pp. 1-18.

¹⁷ Alien and Sedition Act of 1798, 1 Stat 596, Act of July 14, 1798.

¹⁸ Id. See also D. Pember, *Mass Media Law*, Madison WI, W.C. Brown & Benchmark, 6th ed., (1996), pp. 64.

¹⁹ Pub L No 150, HR 8753 (16 May 1918) See also, *New York Times v. Sullivan*, 376 US 254, 276 (1964)(declared that “although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history”)

²⁰ When Thomas Jefferson took office as President in 1801, he considered the Sedition Act null and void and pardoned every person prosecuted under it;

A review of historical literature teaches that sedition in America has mainly involved situations of armed conflict. For instance, following the American involvement in World War I, there was significant criticism of the draft.²¹ Some commentators put the number of draft dodgers to nearly 350,000.²² In response to these developments, Congress swiftly enacted the Espionage Act of 1917 which, in part, made it an offence when the nation was at war for any person wilfully to “make or convey false reports or false statements with intent to interfere” with the military success or “to promote the success of its enemies.”²³ This legislation also made it an offence to wilfully “obstruct the recruiting or enlistment service of the United States.”²⁴ Under this legislation, convictions could be punishable by prison terms of up to twenty years (20) and penalties of up to \$10,000.

In 1918, Congress amended the Espionage Act of 1917 by its adoption of yet a more restrictive Sedition Act of 1918. This new legislation prohibited individuals from saying anything with the intent to obstruct the sale of war bonds; to “utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language” calculated to cause hatred or scorn for the form of government of the United States, the Constitution or the flag; or utter any words supporting the cause of any country at war with the United States or

while Congress used its spending powers to reimburse anyone fined under the Sedition Act and expressed its own views about the unconstitutionality of the Act.’ See, L. Fisher and N. Devins, *Political Dynamics of Constitutional Law*, West Publishing, (1992), pp. 11, 16-17, citing T. Jefferson, *11 The Writings of Thomas Jefferson*, A. Bergh ed., (1904), pp. 43-44, 50-51 and H.R. Rep. No. 86, 26th Cong., 1st Sess. (1804); For a discussion of the cases prosecuted under the Sedition Act, see A. Lewis, Freedom of Speech and Incitement Against Democracy, in *Freedom of Speech and Incitement Against Democracy* (D. Kretzmer and F. Hazan, eds. The Hague, Kluwer International, 2000), pp. 3.

²¹ See, Z. Chaffee, *Free Speech in the United States*, Harvard University Press, 2nd ed., (1941), pp. 108-111; D. Rabban, “The First Amendment in its Forgotten Years,” 90 *Yale. LJ* (1981), pp. 514, 581-582.

²² See, R. Goldstein, *Political Repression in Modern America from 1870 to Present*, Boston, KG Hall, (1978), pp. 105.

²³ Espionage Act of June 15, 1917, ch. 30, tit. I § 3, 40 Stat. 219.

²⁴ *Id.*

opposing the cause of the United States.²⁵ The leading cases decided under the Sedition Act were *Schenck v. United States*²⁶ and *Abrams v. United States*.²⁷ In each of these cases, the Supreme Court upheld the convictions and the constitutionality of the both laws and their application to speech.²⁸

The case of *Schenck v. United States* involved the distribution of pamphlets which urged resistance to the draft during the First World War. The defendants in *Schenck* were charged under the Espionage Act of 1917 that they conspired to “cause and attempted to cause insubordination in the military and naval forces of the United States, and obstruct the recruiting and enlistment service of the United States.”²⁹ The written material at issue in that case said “do not submit to intimidation” but restricted itself to peaceful means such as a petition for the repeal of the Act. On a separate side, it had a heading “Assert Your Rights.” It explained that any one who denied ‘your right to assert your opposition to the draft’ violated your constitutional right.³⁰ It further described the ‘arguments from the government as coming from shrewd politicians and a mercenary capitalist press.’³¹

On the other hand, the case of *Abrams* concerned the distribution of pamphlets against America’s decision to send troops to Russia to fight

²⁵ Act of May 16, 1918, 40 Stat. 553.

²⁶ 249 US 47 (1919)

²⁷ 250 US 616 (1919)

²⁸ In addition to these rulings, there were notable rulings by lower federal courts concerning the Acts. For instance, in *Shaffer v. United States*, 255 F. 886 (9th Cir. 1919), the court upheld the application of the Espionage Act of 1917 against a book critical of American involvement in World War I. It was said in *Shaffer* that the test is “whether the natural and probable tendency and effect of the publication are such as are calculated to produce the result condemned by statute.” Also, in *Masses Publishing Co v. Patten*, 244 F. 535 (S.D.N.Y. 1917) rev’d 246 F. 24 (2d Cir. 1917), Judge Learned Hand attempted to draw a clear distinction between incitement and discussion. He said that one “may not counsel or advise others to violate law as it stands. Words are not only the keys of persuasion, but are triggers of action.” For a thorough review of these cases, see generally Chaffee, *supra* note 21.

²⁹ *Schenck*, 249 US at 48

³⁰ *Id.*

³¹ *Id.*

against the Communists. The five defendants in *Abrams* were all Russian immigrants. They were charged with and convicted of four counts of conspiracy to violate the Espionage Act of 1917 as amended by the Sedition Act of 1918. The first three counts charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write and publish: In the first count, “disloyal language about the form of government of the United States;” in the second count, language “intended to bring the form of government of the United States into contempt;” and in the third count, language “intended to incite, provoke and encourage resistance to the United States in said war.” The charge in the fourth count was that the defendant conspired “when the United States was at war with Imperial German Government, unlawfully, by publication to urge, incite and advocate curtailment of production of things and products, to wit, ammunition, necessary to the prosecution of the war.”³²

The first of the two leaflets at issue in *Abrams* said that the “President’s cowardly silence about the intervention in Russia revealed the hypocrisy of the plutocratic gang in Washington.”³³ It called on workers to “awake against the true enemy of the world, capitalism.” The second leaflet directed its attention to Russian immigrant worker in the ammunition factories and said “you are producing bullets, bayonets, cannon to murder not only Germans, but also your dearest, best, who are in Russia fighting for freedom.”³⁴ In his majority opinion in *Schenck* and his dissent in *Abrams*, Justice Wendell Holmes announced the popular test of “clear and present danger” to establish the existence of seditious libel. Writing in his dissent in *Abrams*, Holmes explained:

³² *Abrams*, 250, US at 617

³³ *Id.*

³⁴ *Id.* *Abrams*, (Holmes, J., dissenting opinion) at 625-626

“I think that we should be eternally vigilant against attempts to check the expression of opinions that we loath and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purpose of the law that an immediate check is required to save the country.”³⁵

Based on this test, speech is seditious when there is a ‘clear and present danger’ of unlawful action. Accordingly, Holmes declared in *Schenck* that:

“the character of every act depends upon the circumstances in which it is done. The question in every case is whether the words used, are used in such circumstances and are of such a nature as to create a clear and present danger that they bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”³⁶

The striking relevance of the ‘clear and present danger’ test was its obvious abandonment of the focus on ‘bad tendency’ or derogatory inclination in the earlier English cases. This new approach went far beyond simple words and their derogatory inclinations. It emphasized on the observation of substance and probable outcome of the behaviour.³⁷

RECENT AMERICAN LEGISLATION

(a) The Smith Act and Era of Dennis

The most recent sedition legislation in the United States is the Smith Act of 1939. The Smith Act provides in pertinent part as follows: “Sec. 2. (a) It shall be unlawful for any person (1) to knowingly or wilfully advocate,

³⁵ Id at 630

³⁶ *Schenck*, 249 US at 48.

³⁷ For an elaboration of this test, See, *Whitney v. California*, 274 US 357, 376-378 (1927)(Brandeis, J., concurring)(held that “the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil fear of serious injury cannot alone justify suppression of free speech and assembly. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.”)

abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by assignation of any officer of any such government.”³⁸ The principal case prosecuted under the Smith Act is *Dennis v. United States*³⁹ *Dennis* involved the prosecution of the twelve governing members of the Communist Party of the United States. The indictment charged the defendants with wilfully and knowingly conspiring (1) to organize the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.⁴⁰

In affirming the convictions, the Supreme Court reasoned that there is a difference between advocacy and discussion of violence against the government. The *Dennis* Court explained that the Smith Act is directed at advocacy not discussion. The Court understood discussion as any peaceful communication of ideas such as the studies of Marx or Lenin in universities, while advocacy as the communication used to urge, plan, or set in motion unlawful acts against the government.

Whereas the Court professed to use the ‘clear and present danger’ test, it construed it in a new light. In clarifying this test, Chief Justice Vinson explained that:

“[the] words cannot mean that before the Government may act, it must wait until the putsch is about to be executed. The plans have been laid and the signal is awaited if Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and commit them to a course whereby they will strike when the leaders feel the

³⁸ See, *Dennis v. United States*, 34 US 494 (1951)

³⁹ *Id.*

⁴⁰ *Id.* at 497

circumstances permit, action by the Government is required. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate members or power of the revolutionists, is a sufficient evil for Congress to prevent.”⁴¹

In the years following the *Dennis* ruling, the Supreme Court decided several cases under the Smith Act. In *Yates v. United States*⁴², the Court reversed the convictions of several individuals for conspiracy to violate the Smith Act. The Court declined to follow the *Dennis* approach and underscored that there was a fundamental “distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action.”⁴³ The Court did not undermine *Dennis*, but distinguished it.

According to Justice Harlan, who wrote for the majority, *Dennis* held that “the indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify the apprehension that action will occur.”⁴⁴ The Court found this was not present in *Yates*. It held that people are free to talk about the suitability of using violence to overthrow the government and may even express the desire to have the government overthrown by violence because the Smith Act does not prohibit the advocacy and teaching of a mere abstract doctrine of forcible overthrow of the government.

Justice Harlan further explained that the ‘distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something.’⁴⁵ Under the *Yates* test, the defendant must have advocated concrete action aimed at violent

⁴¹ Id. at 509

⁴² 354 US 298 (1957)

⁴³ Id at 318-321

⁴⁴ Id at 321

⁴⁵ Id. at 324-5

overthrow of the government. Advocacy of violence in the abstract is not sufficient. The *Yates* Court emphasized the intention of the advocates, not the likelihood of their success. The problem with *Yates* is determining whether speech is advocacy of doctrine or advocacy of action. However, the superiority of the *Yates* decision is its elimination of the requirement of imminence, which led to greater protection of speech.

(b) The Smith Act and Era of Brandenburg

Towards the mid 1960s, the highest American Court appeared to be more protective of freedom of speech.⁴⁶ The main case supportive of this development is *Brandenburg v. Ohio*.⁴⁷ In *Brandenburg* a Ku Klux Klansman from Ohio, was convicted under the Ohio Criminal Syndicalism statute for “advocating violence as a means of accomplishing political reform”⁴⁸ The defendant was fined \$1,000 and sentenced to one to 10 years’ imprisonment. On appeal, the Supreme Court struck down the Ohio law on constitutional grounds.⁴⁹ The Court explained that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of violation of law unless it incites “imminent lawless action”⁵⁰ The Court considerably modified Justice

⁴⁶ See, *Bond v. Floyd*, 385 US 116 (1966)(held that the Georgia legislature could not refuse to seat Julian bond because of his support for a statement strongly critical of the Vietnam War and the draft. The Court invoked the *Yates* test and concluded that Bond’s statements were advocacy of ideas protected by the First Amendment); *Watts v. United States*, 394 US 705 (1969), the Court reversed the conviction of an individual for violating the law that made it a crime to: knowingly and willfully threaten to take the life of or inflict bodily harm upon the President.” Watts was convicted under this law for saying “if they ever make me carry a rifle the first man I want to get in my sight is L.B.J. They are not going to make me kill my black brothers.” The Court stated that the Watts’ statement was “political hyperbole,” not a real threat, and therefore was protected under the First Amendment.

⁴⁷ 395 US 444 (1969)

⁴⁸ *Id* at 445

⁴⁹ *Id.*, See also, H. A Linde, ““Clear and Present Danger” Reexamined: Dissonance in the Brandenburg Concerto,” 22 *Stanford LR* (970), pp.1163.

⁵⁰ *Brandenburg*, 395 US at 447

Holme's 'clear and present danger' approach. Justice Douglas in his concurring opinion criticized the 'clear and present danger' test as follows:

“First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.⁵¹

In *Brandenburg*, the Court effectively broadened the scope of the First Amendment protection by concluding that a mere 'abstract teaching of the moral propriety or even moral necessity for a resort to violence' is not seditious. Therefore, a conviction for incitement under *Brandenburg* is constitutional only if several requirements are met namely: imminent harm, a likelihood of producing illegal action, and an intent to cause imminent illegality.⁵² None of the earlier tests had contained an intent requirement. Furthermore, *Brandenburg* underscored the significance of the pre-eminence of danger in determining sedition, an approach which is protective of freedom of speech and gave greatest protection to the most recalcitrant speech. While the decisions by the United States Supreme Court have often been cited in many court decisions throughout Southern Africa, there are certain opinions that these courts are unwilling to adhere.

SEDITION IN MALAWI

(a) Sedition under the Malawi Penal Code

Sedition in Malawi is probably one of the highest political crimes. A majority of cases against individuals charged and convicted under the

⁵¹ Id at 454. The clear and present danger test relied upon the judge's subjective interpretation. The intention of the accused was determined through decoding and construction and revealing the innuendo behind the words used.

⁵² *Brandenburg*, supra note 48; For an analysis of the Brandenburg test see, L. Alexander, Incitement and Freedom of Speech, in *Freedom of Speech and Incitement Against Democracy* (D. Kretmer and F. Hazan, eds. Kluwer International, 2000), pp. 105-114.

nation's sedition legislation have often drawn in political considerations.⁵³ This was also publicly acknowledged in 1993 by then United States Vice President Al Gore when he commented, in connection to the arrest and continued detention of political dissident Chakufwa Tom Chihana, that "I believe the [sedition] charges against him were politically inspired."⁵⁴ Sedition is criminalized under the Code. Section 50 of the Code provides that:

"(1) A seditious intention is an intention:

- (a) to bring into hatred or contempt or excite disaffection against the person of the President or the Government; or
- (b) to excite the subjects of the President to procure the alteration, otherwise than by lawful means, of any other matter in the Republic; or
- (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Republic; or
- (d) to raise discontent or disaffection amongst the subjects of the President; or
- (e) to promote feeling of ill-will and hostility between different classes of the population of the Republic."⁵⁵

The leading case determined under section 50 of the Code is *Chihana v. Republic*.⁵⁶ *Chihana* involved the importation and physical possession of seditious publications by the Appellant, Chakufwa Chihana. Chihana had been charged with and convicted of two counts of seditious intent. The first count charged Chihana with importing seditious publications in

⁵³ *Chipembere v. Regina* 1961 R. & N. 865 (F.S.C.); *Banda v. Regina*, 1961 R. & N. 844 (F.S.C.); *Chihana*, *supra* note 1; See, also the arrest and charge of Rev. Aaron Longwe in 1992 for sedition after addressing a meeting in Northern Capital City of Mzuzu in the run-up to the 1993 national referendum.

⁵⁴ Office of the United States Vice President, Press Release 14 April, 1993.

⁵⁵ Section 50 of the Code.

⁵⁶ *Id.*

contravention of Section 51(1)(d) of the Code, and second count of being in possession of seditious publication without lawful explanation in breach of section 51(2) of the Code.⁵⁷ The trial court sentenced Chihana to eighteen months on the first count and twenty four months on the second count.

In upholding the constitutionality of both the sedition law and convictions, the Supreme Court of Appeal explained that “the right of every citizen of the Republic of Malawi to have a candid, full and free discussion on any matter of public interest may be subject to restrictions and limitations”.⁵⁸ In addition, the Court declared and accepted that the United Nations Universal Declaration of Human Rights was part of the law of Malawi and that the freedoms contained in that declaration must be respected and can be enforced in national courts.

The Court reviewed several foreign cases, including those from America and Europe that recognized restrictions and limitations on speech. However, without any specific reference to American case law, the Court concluded that limitations and restrictions on speech are of universal application.⁵⁹ Banda expressly dismissed the absolutist view of freedom of speech. The Chief Justice then focused on what was described as the main issue on appeal, that is to say, whether the law of sedition in Malawi requires an element of incitement to violence before a conviction can be qualified?

Chihana’s indictment was founded wholly upon a document titled “Prospects for Democracy in Malawi.” The document said that “the president and his government are the worst dictatorship in the whole continent of

⁵⁷ Id.

⁵⁸ See, Section 2(2) of the Constitution of Malawi provided that “Nothing contained in or under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that the law in question is reasonably required in the interests of defense, public safety, public order or the national economy.”

⁵⁹ A specific reference to the American case law would have at least included such recent sedition cases like the *Brandenburg*, supra note 47, *NAACP v. Claiborne Hardware Co.*, 458 US 886 (1982); and *Hess v. Indiana*, 414 US 105 (1973)

Africa” The Justices concluded that these words were intended to arouse feelings of hatred, contempt or disaffection against the president and his government.⁶⁰ The document also asserted that “the country, including the Armed Forces and the Civil Service, have been slaves under a dictatorship for 30 years,” and the Justices concluded that these words were intended to inflame or incite feelings of hatred, contempt and disloyalty or disaffection among the people and members of the Armed forces and the Civil Service against the president.⁶¹ The Court explained in conclusion that these statements could ‘not have been intended as constructive advice or criticism, rather were deliberately couched in order to achieve the desired effect’.⁶²

No argument seems necessary to show that these pronouncements were in no way calculated or intended to produce hatred again the President and his Government. Nevertheless, the statements were crucial to Chihana’s conviction. They were not only used to prove that Chihana had intended to arouse feelings of ‘hatred, contempt or disaffection’ against the President of Malawi and his government, but also to prove that Chihana intended to achieve the desired effect of his speech. Chihana, according to the Court, “had crossed the line between political criticism and insult.”⁶³

It seems too plain to be denied that there is greater than lawful restrictions on speech if a Court has to infer sedition from the words used. In other words, if a judge cannot deduce seditious intent from express words, inference of seditious intent would seem to violate the constitutional protections on speech unless an element of ‘imminent disorderly conduct’ is present. The *Chihana* Court admitted that except by inference, Chihana’s statements were not on the face of it seditious. His statement expressly called for a “peaceful change”, in opposition to violent change. How then

⁶⁰ *Chihana*, supra note 1

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

could such a statement be reasonably calculated to incite hatred or ill will? Moreover, there was no evidence of an outbreak of violence in the aftermath of Chihana's importation of the statement.

Furthermore, his statement did not expressly or implicitly call for violence, refer to any illegal organization, promote any disorderly conduct, or call the people into any specific action calculated to bring the President or his Government into contempt. The only reasonable conclusion is that Chihana spoke on matters of public concern because no opposition existed in Parliament at that time to offer alternative advice towards national government policy. As a result of this abnormal situation, Chihana was within his constitutional rights to exercise his duty of criticism outside Parliament in the manner that he did. Regarding speech critical of the government, Lord Bridge of Harwich has explained that:

“In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that their opponents would make a better job of it than those presently holding office.”⁶⁴

It was conceivable then for the *Chihana* Court to agree with the prosecution because Malawi was a one party state, which suggests that there was an operative ban on Chihana or any other person criticizing the government, even for purposes of suggesting an alternative governmental policy.

Moreover, Chihana's speech could be reasonably construed as appealing to the government to address the political and economic concerns

⁶⁴ *Leonard Hector v. Attorney-General of Antigua and Barbuda and Others*, 1990 AC 312.

of the people. This ability to criticize and offer alternative suggestions to the government is undeniably crucial to effective running of government, because it is through criticism that people can influence their government's choice of policies and public officials held accountable to pave the way for their replacement.⁶⁵ Therefore, criticism of the government and its officers is the pinnacle to freedom of speech. In fact, it seems that democracy would demand that any political speech should be protected. Lord Bridge seems to agree with this view when he said 'political officers must always be open to criticism.'⁶⁶

The danger of the approach taken by the *Chihana* Court is that judicial recourse to hidden meanings within a speech renders impossible any objective examination of the government's case against dissidents. This also raises even more acutely the problem of intent of the judge. Through inference, the *Chihana* Court politically appropriated the statements of Chihana and attributed to them a purpose, in this case seditious. Considering that one could not have reasonably determined the intent of the words used in Chihana's speech, it would have made the most legal and democratic sense to examine the likelihood of the allegedly perceived effects of his speech. Such examination should have inquired into whether Chihana's intention had an imminence of causing harm to the president or his government. Otherwise, anyone may be convicted for publishing or importing a statement critical of the government.

Under current law, a statement that "the government of Malawi has the worst human rights record in the world" could be interpreted as seditious by a zealous prosecutor, because, arguably, one cannot expect people living under the worst human rights conditions to be loyal or render their continued allegiance to their president or government, but defy against such government. The Court in *Chihana* was unclear whether the law

⁶⁵ See, A. Meiklejohn, *Free Speech and Its Relation to Self-Government*, New York, Harper & Brothers, 1st ed., (1948), pp. 27.

⁶⁶ *Leonard Hector*, *supra* note 64.

prohibited the statement or its likely effects. If the latter rings true then it would be appropriate to include the element of ‘incitement to imminent disorderly conduct.’⁶⁷ This element would require a court to, among other things, consider the likely effects of any statement alleged to be seditious as a means of balancing between protection of speech and permissible restriction of speech. Even assuming the law did prohibit only the statements notwithstanding its effects, the foregoing requirements would still apply for similar reasons.

Historically sedition laws in Malawi (then Nyasaland) have been less than protective of freedom speech. The case of *Chipembere v. Regina*⁶⁸ is worth mentioning at this point because of its instructions on how courts may determine seditious intent. There, the appellant, Chipembere was convicted of two counts of sedition. These convictions arose out of two political speeches made by Chipembere to large audiences in 1960 at Rumphi and Zomba, respectively. In the first count, Chipembere was convicted of expressing seditious words, contrary to section 57(1) of the Nyasaland Penal Code. In the second count, he was convicted for expressing seditious words, and of ‘advocating’ violence, counter to section of 93(1)(a) of the said code. The Federal Supreme Court upheld the convictions.

In considering a statute corresponding to the statute in *Chihana*, Justice Clayden explained that ‘the crime of expressing seditious words has

⁶⁷ It was argued by the defense that incitement to violence was a necessary element in the offenses of sedition under English Common Law and that since Section 3 of the Malawi Penal Code requires that the provision of the code be construed in accordance with the principles of English Common Law, the law of sedition in Malawi should be construed consistently with evolving notions of English Common Law. This argument was rejected on the basis that English Common Law is irrelevant where you have a legislative definition of seditious intent.’ *Chihana*, supra note 1; See also, United States Department of State, Malawi Human Rights Practices, (1993)(reporting that in November 1993 Parliament amended the sedition laws to include "intent to incite violence" as a necessary element of seditious intent) available www.state.gov (accessed on 19 November 2005).

⁶⁸ *Chipembere*, supra note 53.

to be measured with section 56 which included a definition of seditious intention.’⁶⁹ It was said in *Chipembere* that in ‘determining whether the intention with which any words were spoken was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances which he conducted himself.’⁷⁰

Reading this case in light of Chihana’s statement it follows that a demand to inquire into the incitement of violence is proper and indispensable. For the reason that the natural circumstances of Chihana’s conduct-*the call for peaceful and democratic change*- can only be reasonably understood to result in peaceful change. In addition, the court should have considered the consequence of calling for a peaceful change of government by Chihana. Suppose in his speech, he had called for a violent change of government in stead of a peaceful one. This difference in the wording of his speech makes all the difference. If the court had given the words in his speech their ordinary meaning, it would have found that the ordinary meaning for calling a peaceful change of government means the speaker is opposed to violence and believes not in the use of force to topple a government. This is contrary to a speaker who for instance calls on the “people to arm themselves with firearms” to violently overthrow the government.

If Chihana’s statements or actions were aimed at the overthrow of the government, (as construed by the court) then it could be said that his actions were nothing but a feeble and obtuse attempt to usurp power. It is irrational for anyone to think that any reasonable Malawian believed that Dr. Banda was worse than Mengistu of Ethiopia or Id Amin Dada of Uganda as alleged by Chihana. A contrary finding in the circumstances of his case would require an incitement of violence, which was not present in *Chihana*.

⁶⁹ Id. at 868

⁷⁰ Id, cited also in *R v. Sekhonyana*, 1998 5 BCLR 640 (Les).

The conclusion in *Chihana*, thus, was as a matter of law inconsistent with the seditious jurisprudence in *Chipembere* and the earlier cases.⁷¹

It is undeniable that the challenge faced by the *Chihana* Court of drawing the line between freedom of speech and restriction on speech is not unique to Southern Africa. In *R v. Sekhonyana*,⁷² the Lesotho High Court was faced with a similar challenge. There, the defendant was convicted of sedition under section 4(1)(b) of the Sedition Proclamation No. 44 of 1938 (Lesotho). The latter statutory provision is similar to Section 50 (1)(A)(b) of the Code. Section 3(1) of the Proclamation also defines seditious intent in similar terms to the Code. The accused in this case was a politician who had previously held various ministerial positions in the previous government of Lesotho.⁷³ He was a member of a political party that had no representation in Parliament.⁷⁴

The statement in question was made on 13 November, 1993 during a political rally. The statement said that “members of the National Party should get firearms to protect themselves from the Lesotho Liberation Army (LLA)” which he alleged, was being “trained in the Republic of South Africa to replace the armed forces.” It accused the government of “secretly plotting against the people.” It also called on people “to arm themselves with firearms and ready to protect themselves from the LLA.” The statement challenged the members of the armed forces, asking whether “they want to wait until the situation in Lesotho deteriorating to the level of Somalia,” and suggested that if “the armed forces were afraid of the LLA, the members of his party would die fighting.”⁷⁵

The High Court, concluded that the ‘accused had a seditious intent in terms of section 3(1) (i), (ii) and (iv) of the proclamation. The words which the Court was interpreting in this case were “to bring into hatred or to excite

⁷¹ *R v. Buchanan*, 1957 R. & N. 527 (F.S.C.)

⁷² *R v. Sekhonyana*, 1998 5 BCLR 640 (Les)

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

disaffection against the person of Her Majesty as by law established”⁷⁶ similar to those used in section 50(1)(a) of the Code. The High Court held in this case that the “accused was not merely pointing out errors or defects in Government or Constitution of Lesotho as by law established or in legislation with a view to remedying such errors or defects.” What he was doing “was to bring into hatred or contempt or incite disaffection against the Government of Lesotho as by law established.”

A common feature in the *Chihana* and *Sekhonyana* decisions is their reluctance to clarify the status of the common law offence of sedition. In both cases, an appeal was made to the court to apply the principles of common law in the determination of what constitutes a seditious offence. In *Chihana*, for instance counsel for the Appellant submitted that ‘incitement to violence was a necessary element in the offence of sedition under English common law and that since section 3 of the Code requires that its provisions be interpreted in accordance with the principles of legal interpretation obtaining in England, the law of sedition in Malawi should be read consistent with the evolving principles of English common law.’⁷⁷ The Court dismissed this submission and held that “we can only refer to the rules of construction obtaining in England when there is no express provision and where the words of the section being interpreted create a difficulty, an absurdity or an ambiguity;” that “it is not necessary to look to principles of English Common law in order for us to know what hatred, contempt or disaffection means because those words must be given their ordinary meaning.”

Similarly, one of the issues that was submitted to the Court in *Sekhonyana* was whether in view of the enactment of the Proclamation at issue in this case, the common law offence of sedition continued to exist. The Court worded the question as follows: did the legislature intend to amend the common law in such a way that the common law offence of

⁷⁶ Section 3(1)(i)

⁷⁷ *Chihana*, supra note 1.

sedition was abolished? The Court brushed aside the issue and explained that ‘it was now necessary [for the Court] to make a decision on this issue since the Proclamation clearly defined a seditious intention from which one can easily establish what “seditious words” are.’⁷⁸ It further stated that, should the need to define sedition arise, the Court would resort to the English dictionaries as well as to the common law definition of sedition.⁷⁹ Recently, the Lesotho Court of Appeal echoed this need to redefine the common law definition of sedition in *Manyau v. R*.⁸⁰ According to the Court, this is needed “because the common law must comply with the Constitution of Lesotho as its supreme law.”⁸¹ The Court went to say that “the common law *actus reus* for sedition as it applies in Lesotho since the adoption of the Constitution must be approached with care.”⁸² Such an approach according to the Court means that “certain [authorities] in South Africa, to the extent that they suggest that acts falling short of subversion and defiance and which amount only to a challenge to authority or protest against its exercise, constitute sedition.”⁸³ Nevertheless, the higher courts in both countries implicitly sustained the common law offence of sedition without explicitly saying so.

The *Sekhonyana* and *Chihana* cases actualize the difficulty faced by Southern African courts in freedom of speech jurisprudence. On the one hand, courts have to protect the right of individuals to speak on matters of public concern, and on the other preserve the integrity of the government. After all, courts are part of the political process notwithstanding that they are supposed to remain neutral on matters of politics. It is not an exaggeration to say that courts often tend to aid in advancing the political

⁷⁸ *Sekhonyana*, supra note 72 at par. 14.

⁷⁹ *Id.*

⁸⁰ *Manyau v. R* [2005] 3 All SA 90 (Les)

⁸¹ *Id.* at par. 19.

⁸² *Id.*

⁸³ *Id.*

wishes of the day. The foregoing cases exemplify this phenomenon in the Southern African context.⁸⁴

(b) The Test for Reasonable Restriction on Speech

From the standard point of a strict constructionist, perhaps a provision like the First Amendment to the United States Constitution protects all ideas. However, with the exception of Justices Hugo Black and Douglas, this view has never commanded a majority of the Supreme Court of the United States.⁸⁵ Similarly, in Malawi the Supreme Court of Appeal, through Chief Justice Banda, expressly declared that “it is wrong to describe or treat the right to freedom of speech as absolute.”⁸⁶ Most jurists would concur that no matter how appealing the unrestrained view for freedom of speech, it is plainly unsustainable. There are several reasonable grounds from which the government must be able to punish certain kinds of speech such as lying under oath. The issue often is what constitutes reasonable government restrictions on speech.

In considering this issue, the *Chihana* Court considered several European cases, including *Castells v. Spain*,⁸⁷ brought under Article 10(2) of the European Convention on Human Rights, for the proposition that limitations and restrictions on speech were universally applicable. There, in concluding that there had been a violation of Article 10 of the Convention, the Commission reasoned that freedom of expression was not unrestrained.

⁸⁴ Compare the American cases of *Schenck*, supra note 26, *Abrams*, supra note 27 and *Dennis*, supra note 39 and others.

⁸⁵ *New York Times Company*, 403 US at 713; Justice Hugo Black and Douglas are the only known members of the Court who took the absolutist view of the First Amendment. See, H. Black, “The Bill of Rights,” 35 *NYUL Rev* (1960), pp. 865, 874-879, (stating the phrase “Congress shall make no law,” is composed of plain words, easily understood. The language is absolute; that the framers did this balancing when they wrote the First Amendment... thus courts have neither the right nor the power to make a different judgment) See also, B. Woodward & S. Armstrong, *The Brethren*, New York, Avon Books, (1979), pp. 194-195, (stating that “since Black’s departure, Douglas was the only First Amendment absolutist on the Court.”)

⁸⁶ *Chihana*, supra note 1

⁸⁷ 14 EHER 445 (1991)

However, it underscored that in “a democratic society, freedom of expression is an essential element for the formulation of political opinion” that “it follows from this that criticism levelled at government should find an answer in the forum of counter arguments.”⁸⁸

The Commission further gave details that “the government of a democratic State is able to avail itself for this purpose of a wide range of means to respond to unjustified attacks or criticism directed at the government by the opposition: [namely] statements by the appropriate minister before Parliament, the holding of a press conference, use of the right of reply, publication of an official announcement, etc” In the circumstance of Chihana, the authorities in Malawi did not use any of these available means to answer the so-called serious accusations brought against the government by Chihana, nor did the Court opinion scrutinize the government’s actions in this regard.

A more recent case decided under article 10 of the European Convention is instructive for our purposes on the kind of restrictions that maybe considered reasonable in a democratic society. *Ceylan v. Turkey*,⁸⁹ decided in 1999, involved a Turkish citizen and labour activist Mr. Ceylan. Ceylan was charged under Article 312(2) and (3) of the Turkish Criminal Code and found guilty by the National Security Court. The Court sentenced him to one year and eight months imprisonment, plus a fine of 100, 000 Turkish liras. After his appeal by the Court of Cassation was dismissed, Ceylan brought his suit to the European Court of Human Rights. The Court set aside the conviction and explained that freedom of speech as set out in Article 10 was subject to exceptions, ‘which must however, be construed strictly, and the need for any such restrictions established compellingly.’ Judge Wildhaber, who wrote for the majority, declared that ‘there is little

⁸⁸ Id at 463.

⁸⁹ ECHR App. No. 23556/94 (1999)

scope under Article 10 of the Convention for restrictions on political speech or on matters of public concerns.⁹⁰

Reading the Court opinion in the *Ceylan* case in light of the *Chihana* case, it would seem apparent that European Court has not recognized restrictions on speech where the speech expresses ideas in relatively moderate terms not associating with recourse to violence or inciting the population to use illegal means. In this regard developments in English law, in interaction with the standards set by the European Court in its interpretation of the European Convention on Human Rights, are particularly interesting.

The European Court teaches that freedom of expression comprises the right to engage in open discussion of difficult problems, such as those facing Malawi in the years leading up to 1992, in order to analyze the root causes of a situation or to express opinions on possible solutions. It is clear therefore that at least in European terms Chihana's conviction constituted a form of censorship which is inconsistent with the demands of a democratic society. Similarly, it is unquestionable that the Malawi Supreme Court of Appeal selectively misapplied both European and American case law because a proper application of the cases from both said jurisdictions would have commanded a different outcome.

THE IMPORTANCE OF CHIHANA V. REPUBLIC

Although Chihana was wrongly convicted, his guilt or innocence is not the only important question in this case. Chihana certainly did not say more than his counterparts in the American Communist Party cases discussed above. He did import and possess a statement calling on people to stand up against President Banda and his government. What he did was more than express his opinion. He was calling on others to act. Nothing had to be decoded by reviewing the innuendo behind the words used by Chihana, for his intention was express. However, it should be plain from the American

⁹⁰ Id. para 35., See also, *Wingrove v. United Kingdom* judgment of 25 Nov. 1996, Reports 1996-V, p. 157, para. 58

and European cases that the Malawi Supreme Court of Appeal would have had difficulty in finding support from these jurisdictions in convicting Chihana had they chosen to seek it there.

But suppose we strip *Chihana* of its Malawian context. Imagine Chihana as a Marxist revolutionary in the 1950s fighting for the overthrow of capitalism. He makes a statement and publishes it as he did in 1992. He is caught by American authorities. Where all this is true, he would probably have received a long prison sentence and upheld by the United States Supreme Court. What makes his case unique and his conviction erroneous in the Malawi context is the fact that Chihana was advocating what most people generally desired-- change. Communists in America and their proposals were extremely unpopular, disliked by both the public and government. They were successfully prosecuted precisely because of their unpopularity and the dislike the people felt for them. In contrast, Chihana's statement reflected the popular will in Malawi. So much that if Chihana was guilty of sedition, then so were most people and, without a doubt, many, if not most, government officials.

CONCLUSION

The task of drawing the difference between seditious libel and lawful criticism is a dilemma facing any State. The clear dilemma as Fredrick Lawrence puts it is "how can we limit speech based solely on some evaluation of its consequences, yet how can we fail to take consequences into account."⁹¹ For countries in transition or war, the distinction between lawful criticism and unlawful incitement can easily be imprecise. Therefore, America sentenced politically impotent Communists to long prison terms. Given the time when the sentences were imposed, the rulings that brought about these convictions were apparently rational and supported by popular

⁹¹ F. Lawrence, Violence-Conducive Speech: Punishable Verbal Assault or Protected Political Speech?, in *Freedom of Speech and Incitement Against Democracy* (D. Kretzmer and F. Hazan, eds. The Hague, Kluwer International, 2000), pp. 11.

sentiment. Western countries have definitely progressed since what used to be considered as a clear matter of seditious libel in both England and America is presently generally regarded as merely the fervent speech which is constitutionally protected.⁹² Justice Holmes's popular 'clear and present danger' test was severely criticized and by the 1960s the United States Supreme Court had taken measures to impose stringent and more demanding test for sedition.⁹³

Yates was a landmark decision in the American law of sedition. It required proof that defendants intended specific violent action aimed at the overthrow of the United States government. The *Yates* Court stated that advocacy of unlawful acts is protected by the First Amendment. However, it is worth noting that *Yates* was decided in a very different political context to *Dennis*. When *Yates* was decided, Stalin was deceased and criticized by his successor Nikita Khrushchev. *Dennis* which was influenced by the 'clear and present danger' test was never over-ruled by the Supreme Court in *Yates*, but was distinguished by it. After *Yates* was decided, the Supreme Court rarely upheld convictions under the Smith Act. For example in *Noto v.*

⁹² See, Barendt, *supra* note 5 at 152. In America, the distinction between lawful criticism and seditious begun to develop in the late 1950s, where the Court took a more protective position on the right to speak on political matters. The Court shifted its focus on the 'immediacy of lawless action.' See, *Brandenburg*, *infra*. Similarly, in the United Kingdom freedom of political speech became more secure in the 1880s. See, *R v. Burns*, 16 Cox CC 335 (1886); *R v. Aldred*, 22 Cox CC 1 (1909) Like in the United States, the attention focused on the effects of words instead of the words themselves. The test for sedition in the United Kingdom is whether words will be likely to incite the audience addresses. The key is *R v. Arrowsmith* QB 678 (1975), where the defendant distributed literature at an army centre advocating soldiers not to serve in Northern Ireland. The court observed that "what it is concerned with is the likely effects on young soldiers aged 18, 19 or 20, some of whom may be immature emotionally and of limited political understanding." Arrowsmith was convicted after it was found that the literature was "mischievous," "wicked" and comprised the "clearest incitement to mutiny and desertion." Her conviction was upheld by the European Commission on Human Rights (7050/75) after considering the possible result of mutiny and desertion if Arrowsmith's campaign were not halted.

⁹³ See, *Bond*, 385 US 116 (1966); *Watts v. United States*, 394 US 705 (1969)(reversing the conviction of an individual on First Amendment grounds)

United States,⁹⁴ the Court reversed a conviction under the Smith Act. As Professor Erwin Chemerinsky argues: “perhaps the major difference between the recent and earlier cases as *Schenck*, *Whitney*, *Gitlow* and *Dennis* is the social climate the prior cases were all issued in intense times where there were strong pressures to suppress speech.”⁹⁵

The reality is that regardless of how an unreasonable prosecution such as *Dennis* seems to men and women in the 21st century, they seemed reasonable to the population at that time. Only in the unfortunate event that such times occur again will it be likely to know if the *Brandenburg* test will succeed in protecting opposition in times of conflict.

Freedom of expression is regularly restricted during wartime.⁹⁶ The clear lesson for Malawi is that, as long as the political leadership feel politically threatened within and without the political structures, including international pressures, the restriction on political speech will be rendered more probable.⁹⁷ This restriction is, in part, the reaction to this fear. For instance, in the early 1990s, there were widespread calls for democratic change across the African continent. Most governments were forced to react to this pressure by calling for a referendum in the case of Malawi or direct election in the cases of Zambia, Lesotho, Kenya, South Africa, and Cape Verde and Sao Tome.⁹⁸ This democratic movement also had a chilling effect

⁹⁴ 367 U.S. 290 (1961)

⁹⁵ Chemerinsky, *supra* note 7 at pp. 991

⁹⁶ See, *Koremastu v. United States*, 323 U.S. 214 (1944) (where the internment which was authorized by the President, advocated by the War Department, ratified by Congress, defended by the Justice Department, and approved by the Supreme Court, destroyed the right to peacefully assemble, the right of free speech, the right to vote, and the right to equal protection of the laws); See also, M. Justice, “War, and the Japanese-American Evacuation and Internment,” 59 *Wash L Rev* (1984), pp. 843.

⁹⁷ See, for example international pressure from the United States Government culminated into a senate resolution, “Expressing the Sense of the Senate Regarding the Government of Malawi's Arrest of Opponents and Suppression of Freedoms, and Conditioning Assistance for Malawi,” S.J. Res. 74, 103rd Cong. 1st Sess. (1993)

⁹⁸ In each of these cases, the changes in the global system evidently influenced the willingness of the incumbent ruler to depart. Of instance, in Malawi Dr

on the right of freedom of expression. In Malawi, there were widespread arrests of people like Chihana, Reverend Aaron Longwe and others on charges of sedition. In Kenya, Paul Muite and other opposition members of parliament were also arrested many of whom were charged with sedition.⁹⁹

As has been demonstrated, Malawi's sedition laws are extremely broad and its broad provisions are strictly construed against free speech. The courts are free to interpret what constitutes seditious intent. As a result, the court swept Chihana's harmless political speech into the seditious libel group. Despite the progress in the legal reform and the adoption of a democratic constitution, there is a pre-existing rationalization for penalizing speech against the President and his government.¹⁰⁰ Since the decision of the European Court of Human Rights in *Ceylan v. Spain* and subsequent others may be regarded as persuasive authority in Malawi, the relevant provisions of the European Convention at issue in that case are mirrored by similar provisions in the current Constitution of Malawi,¹⁰¹ and

Hasting Banda was induced by international pressure to hold a referendum on whether there should be a multiparty system, and the subsequent elections, and finally depart when these were won by one of the opposition candidates. See, C. Clapham, *Africa and International System*, Cambridge, Cambridge University Press (1996), pp. 202, citing C. Baylies and M. Szeftel, *The Fall and Rise of Multi-Party Politics in Zambia*, *Review of African Political Economy* (1992), pp. 75-91.

⁹⁹ See, Kenya Human Rights Practice, U.S. Department of State 1995.

¹⁰⁰ For example, less than one year into his Presidency, President Bingu Wa Mutharika ordered the arrest of several journalist after they published a story that alleged the presence of spirits or ghosts at the State House in the Capital City of Lilongwe that motivated the President's move to another residence. The Journalists were charged with 'publishing false news likely to cause public alarm and fear.' Available at www.bbc.co.uk/world/africa. (accessed on 14 March 2005); See also, "Malawi's Former Water Minister Arrested" (reporting that on 14 September, 2005 Gwanda Chakuamba was arrested and charged under the Protected Flags, Emblems Names Act for allegedly using insulting words against the President of Malawi) Available at www.irinnews.org (accessed on 11 November, 2005).

¹⁰¹ Sections 34, 35, and 36 of the Malawi Constitution may be compared to section 10 (1) of the European Convention. Also relevant are the similar provisions in section 44 and article 10(2) relating to limitations on rights in Malawi and Europe, respectively.

coupled with the famous words of Justice Tambala in the case of the *National Consultative Council v. The Attorney General*¹⁰², that

“There is a need to strike a balance between the needs of society as a whole and those of individuals. If the needs of society in term of peace, law and order, and national security, are stressed at the expense of the rights and freedoms of the individual, then the Bill of Rights contained in our Constitution will be meaningless and the people of this country will have struggled for freedom and democracy in vain. In a democratic society, matters of national security should not be used as an excuse for frustrating the will of the people expressed in their Constitution.”¹⁰³

One may, therefore, predict with some confidence that absent violence or force a political statement critical of the president or government of Malawi would probably receive more protection under current Constitutional Act of 1994, which contains a justiciable Bill of Rights.¹⁰⁴

In the case of Lesotho and the future application of sedition laws, for example, the *Manyau* Court rejected the requirement of an element of violence on the grounds that “it overlooks the nature of present day modern society in general and the functioning of the State.”¹⁰⁵ According to the

¹⁰²Civil Cause No. 958 of 1994 (unreported), See, also quoted in *Malawi Law Society and Others v. President and Others*, (2002) AHRLR 110 (MwHC 2002).

¹⁰³ Id.

¹⁰⁴ The Chakuamba case mentioned in note 100 will probably serve as the test to the scope of the protections on speech under the 1994 Constitution. It was recently reported that Chambuka's case was referred to a Constitutional Court to decide the constitutionality of the Protected Flags, Emblems Names Act. A decision is expected sometime in the year 2006. See, www.dailytimes.bppmw.com (accessed on 19 December 2005). And another recent case involving defendants Mr. Abubakar Mbaya and McDonald Symon both belonging to the former ruling party was referred to the Constitutional Court in February 2006. The defendants were both charged with, among other things, sedition under section 50 of the Code. These cases in addition to the already mentioned Chakuamba case, will serve as test cases on the limits on speech permitted under the current Constitution. See, I. Masingati, “Mbaya Case Referred to Constitutional Court” available at www.nationmalawi.com (accessed on 6 March 2006)

¹⁰⁵ *Manyau*, supra note 80 at par. 17.

Court, “a modern State may be subverted by stratagems which involve no violence,” such as by way of “hacking into computer systems or interference with telecommunications.”¹⁰⁶ However, the Court was sensitive to the concern of what it called the “feudal sweep of the common law offence” and reasoned that the “the common law may have to be addressed in a way which holds in balance the existence of sedition as a separate modern-day offence with its compliance with the Constitution and the fundamental rights the latter entrenches.”¹⁰⁷ For instance, it suggested that ‘the *actus reus* of sedition, in the case of an unlawful public gathering, should relate to [the subversion or defiance] in the functioning of the State; and the *mens rea* should convey an intention on the part of an accomplice to subvert or defy the State.’¹⁰⁸ Accordingly, this suggested definition would, arguably, offer some balance between legitimate forms of expression and permissible restrictions on speech.¹⁰⁹

On the other hand, there is a problem with this definition and that is it fails to take into account the requirement of violence by simply and correctly indicating that certain acts make it impossible to apply this element of violence. While the court’s imagination in this regard is realistic, Hctor, however, correctly points that these modern acts can best be addressed by measures other than sedition. This would allow for courts to retain the element of violence in the crime of sedition, which is important because it renders a better balance between legitimate forms of expression and restrictions thereof. Perhaps, the fact that the element of violence is not effectively applicable to acts imagined by the *Manyau* Court, such as hacking into computers, is an indication that maybe we ought to address these and other similar acts by measures such as in

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at par. 20.

¹⁰⁸ *Id.*

¹⁰⁹ For a critical review of this proposed definition see Hctor, 18 *SACJ* (2005), pp. 347-350 (arguing that the proposed definition may actually be broader in scope than the current definition)

Malawi the Preservation of Public Security Act and in South Africa the Internal Security Act.¹¹⁰

The *Manyau* Court was right to emphasize that the crime of sedition should have to comply with Constitutional demands such as those on freedom of expression and assembly. Permitting an element of violence to be present in the crime of sedition, would effectively serve as a proper balance between these constitutional demands and the limits on them. It would allow free speech even that which seeks to defy the State or cause public inconvenience, annoyance or unrest in a non-violence manner.

In hindsight, it is unconvincing to suggest that since certain acts, in view of modern technology, may not be susceptible to the application of the requirement of violence; this element should be rejected, particularly where we have alternative means of addressing responsibility in such acts. Thus, the new definition, if it takes regards the demands of a free and democratic society should include the element of incitement of violence. Perhaps, an ideal definition of sedition should require that ‘the *actus reus* of sedition relate to a gathering of persons the unlawful purpose of which is to subvert or defy the functioning of the State by force or violence; and its *mens rea* to relate to an intention on the part of a participant so to subvert or defy the State by force or violence.’

What is more is that reform of the sedition law in Malawi should go beyond changing the law itself. A reasonable piece of legislation can be manipulated to fit the political needs of the day. Justice Holmes’s ‘clear and present danger test’ as stringent as it was protected only ‘puny anonymities.’¹¹¹ Some commentators have even criticized that ‘the test extended safety only to the incredible fatuities of the lunatic fringe but

¹¹⁰ See, Hctor, *supra* note 113 at 349. (suggesting that it is possible to establish liability for the acts imagined by the *Manyau* Court under the crime of sabotage spelled out in section 54 (3) of the internal Security Act of 1982)

¹¹¹ *Abrams*, *supra* note 27

not to the more useful opinionated speakers.’¹¹²It is the speaker’s eagerness for the result which discriminates abstract from incitement to action. The problem of course is determining when speech is advocacy of doctrine or advocacy of action. In many instances, this is likely to be a distinction based entirely on how a judge chooses to characterize the speech. As Holmes pointed out “every idea is an incitement.”¹¹³

What should be remembered is that freedom of speech is as important to a democratic society as is oxygen to fundamental human development. The current Constitution, which came into effect in 1994 two years after *Chihana* was decided, provides in sections 34, 35 and 36, respectively that:

34. “Every person shall have the right to freedom of opinion, including the right to hold opinions without interference to hold receive and impart opinions.

35. Every person shall have the right to freedom of expression.

36. The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.”¹¹⁴

Like many constitutions, including that of South Africa in section 36, the Malawi Constitution has a broad limitations clause in section 12(v) and 44 (2) and (3) providing, in pertinent part, that:

12. As all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society.

¹¹² D. Richards, Free Speech as Toleration in WJ Waluchow (ed), *Free Expression: essays in law and philosophy*, Oxford, Clarendon Press, (1994).

¹¹³ *Gitlow v. New York*, 268 U.S. 652, 673 (1925)

¹¹⁴ Malawi Constitutional Act of 1994.

(2) [No] restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

(3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question shall be of general application.

The Malawi Supreme Court of Appeals has yet to be presented with a case to decide the meaning of these broad constitutional provisions in the context of the Seditious Act and the Protected Flags, Names and Emblems Act (which overlaps, in its application, with some provisions of the sedition legislation).¹¹⁵ However, in *Malawi Law Society and Others v. President and Others*,¹¹⁶ the High Court in Blantyre, recently invalidated two directives made by the President on the grounds that they violated constitutional rights to freedom of association, assembly and demonstration, expression, conscience and opinion as enshrined in sections 32, 33, 34, 35, 38 of the Constitution, in that order.

The background to the case is that sometime in the early months of the year 2002, there were rumours circulating that the Muluzi administration had plans to submit a bill to parliament which would seek to amend section 83(3) of the Constitution. This section provides that “the President, the Vice-President and the Second Vice President may serve in their respective capacities a maximum of two consecutive terms.” This sparked a debate amongst all Malawians, which culminated into peaceful demonstrations across the country some for and some against the proposed amendments. Amidst these demonstrations, the President held a rally on 28 May 2002 where he directed that there

¹¹⁵ See comments in notes 104 and 108, above. In this regard, Danwood Chirwa has strongly advocated for constitutional litigation to expound the meaning of the provisions in the current Constitution of Malawi. See, D.M. Chirwa, A Full Loaf is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi, *Journal of African Law* 49, 2 (2005), pp 241.

¹¹⁶ (2002) AHRLR 110 (MwHC 2002).

should be no demonstrations for or against the imagined constitutional amendment concerning presidential term limits and directed the Inspector General of Police and Army Commander to deal with anyone who disobeyed his directive.¹¹⁷

In deciding the constitutionality of the two directives, Judge Twea explained that the banning of ‘all forms of demonstrations’ was unreasonable as such a ban is too wide and not capable of enforcement as events had shown in some cities across the country.¹¹⁸ He further explained that the organizers of the demonstrations on this issue, or indeed any other issue, for or against must bear in mind public tranquillity. This language in the opinion suggests that as long as public demonstrations (political speech as such) are peaceful and consistent with administrative requirements (such as time, place and manner), the government cannot not limit them. The court also criticized the police that they “have at times acted in a biased manner,”¹¹⁹ and reiterated the call by Justice Tambala that “matters of national security should not be used as an excuse to frustrate the will of the people expressed in their Constitution.”¹²⁰ It is against this background that leads one to assume that perhaps the Malawi Supreme Court of Appeal may adhere to this standard and adopt a stronger position against government restrictions on the freedom of expression and other rights enshrined in the Constitution, particularly in context of sedition laws by requiring some element of violence before a speech can be restricted.

Inevitably, the courts must make value choices as to what speech is protected by the relevant provisions of the Constitution, under what circumstances, and when and how the government may regulate speech as demonstrated by the decision in *Malawi law Society and Others v. the*

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id, quoting, Justice Tambala in *National Consultative Council v. The Attorney General*, supra note 103 (see full quote infra).

President and Others. This type of analysis is achievable in reference to the goals that freedom of speech is intended to accomplish. It has historically been accepted that freedom of speech should be protected as a fundamental right.¹²¹ Freedom of speech is the bedrock of any democratic society because it ensures the open discussion of candidates which is essential for the electorate to make informed decisions in elections. The fundamentality of political speech allows people to influence their government's choice of policies.¹²² In this sense, political speech is a political duty of every citizen to ensure their participation in public affairs and self-determination. Self-determination can only subsist in so far as the 'electorate acquires the wisdom, worthiness, integrity, understanding, and liberal admiration to the general welfare that, in theory, casting a ballot is understood to express.'¹²³

The advancement of American and European law helps us to understand why the development of freedom of speech in Malawi still faces a long meandering and complicated road. Political stability and a secure international environment are primary to a tolerant culture in which freedom of speech can thrive.¹²⁴ Freedom of speech does not solely

¹²¹ *Whitney*, supra note 37 at 375-377 (Brandeis, J., concurring) (Justice Brandeis offered an eloquent explanation for why freedom of speech is protected)

¹²² See for example, in 2002, the people of Malawi through public demonstrations and other exercise of their freedom of speech were able to influence their government choice not to amend section 83(3) of the Constitution that if passed would have allowed the President to run for a term of office. In upholding the peoples right to expression and demonstrate, a constitutional court rightly prohibited the government from banning the demonstrations and other forms of expressions. See, *Malawi Law Society*, supra note 116.

¹²³ A. Meiklejohn, *The First Amendment Is An Absolute*, *Sup Ct Rev* (1961), pp. 245, 255.

¹²⁴ M. Redish, "Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger," 70 *Cal L Rev* (1982), pp. 1159; H. Josephs, "The Chinese Democracy Movement in the United States Perspective," 10 *UCLA. Pacific Basin LJ* (1992), pp. 285.

relate to protection of peoples right to speak in society.¹²⁵ Internal circumstances in Malawi will be the most important measures of a tolerant society. Tolerance is a desirable value because it serves as a model that encourages more tolerance across society. From a criminal law stand point, one prosecutor has remarked that ‘the rise in murder cases is partly attributable to this lack of tolerance in the Malawi society.’ It is, thus, indispensable to convince the political leadership in Malawi that national security and public order are not compromised by permitting lawful opposition and criticism even against the person of the President. They need to recognize that permitting such opposition or criticism creates legitimacy of a government. Only then can one appreciate what Dunduzu Chisiza rightly proclaimed, in regards to the post-independent African State, when he wrote that:

“[Political] unrest results from the conviction of opposition parties that the speeches of their parliamentary representatives, in and outside parliament, will not influence governing parties to change some of their policies, once they begin to feel that way, they are often certain to despise and to denounce their opponents as vain and selfish. Their opponents will regard this as mischievous detraction and retort by calling them jealous, visionless. And so the stage is set for full-scale mudslinging which sometimes culminates in the governing party clamping down on their opponents with the force of law”¹²⁶

What continually exists between the government and its opposition is misconstruction. Misconstruction leads to fear, fear makes anyone want to survive, which in turn leads to political suppression and dreadful policies. Discourse and debate, rather than exchange of allegations and insults are the imperative starting points. However, this demands concession,

¹²⁵ L. Bolinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America*, Oxford, Oxford University Press (1986)

¹²⁶ D. Chisiza, *African What Lies Ahead*, 2nd ed, New Delhi, Indian Council for Africa (1967), pp. 2.

moderation and logic on all sides of the table because discussion is a way of combining information and enlarging the range of arguments. At a minimum this is what should occur in a true democracy. Political criticism should be met with counterarguments and political opponents should always feel free to persuade the electorate that they would do a superior task of governing than the current leadership. In such a debate the best ideas will ultimately prevail. It is a proven social fact that disagreements, when their causes are intelligible, can enrich and strengthen, rather than injure, our sense of objectivity.

This article suggest that instead of decriminalizing sedition, Malawi should consider adopting a rigorous and more demanding test for sedition in line with some of the requirements that have been suggested above in favour of more free speech. It is further suggested that a more optimistic altitude towards political speech should be implemented.

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